



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 27 2004

FIRST CLASS MAIL

Carol A. Laham, Esq.
Wiley Rein & Fielding, LLP
1776 K Street, NW
Washington, DC 20006

RE: MUR 5365
Club for Growth, Inc.; and
Club for Growth, Inc. PAC

Dear Ms. Laham:

On May 19, and June 3, 2003, the Federal Election Commission notified your clients of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). Copies of the complaints were forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, the Commission, on October 19, 2004, found that there is reason to believe that Club for Growth, Inc.; and Club for Growth, Inc. PAC violated 2 U.S.C. §§ 433, 434, 441a(f), 441b(a) and 11 CFR §§ 102.5, 104.10, 106.1 and 106.6, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter.

Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.

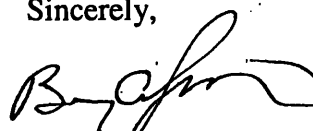
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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Julie McConnell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENTS:** Club for Growth, Inc.
5 Club for Growth, Inc. PAC

MUR: 5365

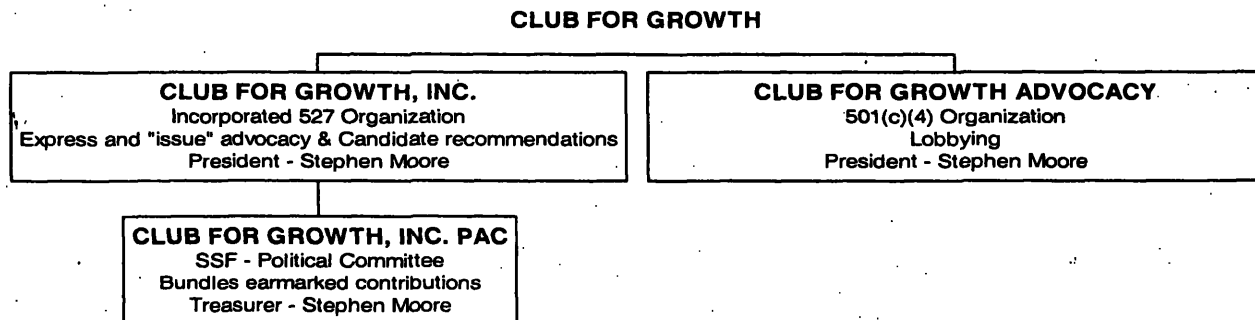
6 **I. INTRODUCTION**

7 This matter was generated by a complaint filed with the Federal Election Commission by
8 the Democratic Senatorial Campaign Committee ("DSCC"), alleging violations of the Federal
9 Election Campaign Act of 1971, as amended ("the Act"), by Club for Growth, Inc.

10 **II. SUMMARY OF FACTS**

11 **A. Organizational Structure of Club for Growth**

12 There are three related entities that use the name Club for Growth: Club for Growth, Inc.
13 ("CFG"); Club for Growth, Inc. PAC ("CFG PAC"), its separate segregated fund ("SSF"); and
14 Club for Growth Advocacy, a 501(c)(4) organization.



15
16 **1. Club for Growth, Inc.**

17 CFG is a Virginia corporation established in May 1999 and organized under Section 527
18 of the Internal Revenue Code. CFG represents itself as a political membership organization
19 primarily dedicated to helping elect pro-growth, pro-freedom candidates through political
20 contributions and so-called issue advocacy campaigns. See Club for Growth, *Federal Form*

1 8871: *Political Organization Notice of 527 Status*, <http://www.irs.gov/charities/political/index.html> (Aug. 4, 2000).¹ To further its mission, CFG endorses a select number of Congressional
2 candidates in each election cycle, recommends that its members contribute to these candidates,
3 and runs advertisements on their behalf highlighting each candidate's position on tax issues. *See*
4 Club for Growth Ad Archive, at http://www.clubforgrowth.org/ad_archive.php (last visited Feb.
5 2, 2004).

6
7 CFG reportedly has 16,000 supporters that it terms "members." *See* Leslie Wayne,
8 *G.O.P. Club Supports Conservative Races*, N.Y. TIMES, Apr. 11, 2004, at A25. Supporters pay
9 annual dues, which cover the cost of researching candidates and fund CFG's advertising
10 campaigns, and which vary in amount based on "membership" level.² *See* How We Will Make a
11 Difference, at <http://www.clubforgrowth.org/how.php> (last visited Nov. 26, 2003); Club for
12 Growth Fundraising Letter, ("Become a member by writing a
13 check for a \$50 introductory membership, a \$100 regular membership, \$250, or even \$1,000.").
14 In addition to these fees, CFG accepts other donations from its supporters to fund its advertising
15 campaigns.³ CFG previously permitted supporters to earmark their "membership" fees and
16 donations to fund commercials criticizing Senator Daschle and, more recently, Howard Dean, a

¹ *See also* Club for Growth, Inc. 2001 Federal Form 990, Attachment 1, <http://www.irs.gov/charities/political/index.html> (Nov. 24, 2002); Club for Growth: Our Vision, at <http://www.clubforgrowth.org/index.html> (Nov. 27, 1999) ("The Club for Growth is a membership organization of thousands of contributors from across the country who are frustrated with the ideological drift of both parties today.") (archived web page). As a tax-exempt political organization under 26 U.S.C. § 527, CFG is required to register with the Internal Revenue Service and report on a monthly or quarterly basis all contributions and expenditures. *See* I.R.C. § 527(i), (j) (2000).

² CFG appears to have recently eliminated the requirement that its "members" pay dues. *See* Membership Application, at <https://www.clubforgrowth.org/join-free> (last visited May 3, 2004).

³ Some members have contributed several hundred thousand dollars to CFG during a single election cycle. A search of Public Citizen's 527 Group Donor Database, which assembles data from disclosure statements filed with the IRS, reveals that four individuals made aggregate donations to CFG in excess of \$300,000 during the 2002 election cycle. Although some reports state that CFG does not accept corporate or union contributions (*see* Liz Halloran, *GOP Faces Battle Within*, HARTFORD COURANT, May 9, 2003, at A1), a search of the 527 database reveals

1 former candidate for the Democratic Presidential nomination. See Club for Growth Membership
2 Form, at <https://www.clubforgrowth.com/join.php> (last visited Jan. 8, 2004).

3 2. Club for Growth, Inc. PAC

4 CFG PAC is a multicandidate committee that is registered as the SSF of CFG. Although
5 the Statement of Organization filed by CFG PAC reports the connected organization as a
6 corporation rather than a membership organization, it appears that CFG PAC treats all CFG
7 supporters as part of CFG's restricted class. See CFG PAC Statement of Organization, Jul. 27,
8 1999, at 1; Club for Growth Bulletin, [http://www.clubforgrowth.org/candidates/020508-](http://www.clubforgrowth.org/candidates/020508-bulletin.html)
9 [bulletin.html](http://www.clubforgrowth.org/candidates/020508-bulletin.html) (May 8, 2002) (recommending that CFG supporters contribute to specific
10 candidates) (archived web page); Kate Ackley, *Interest Groups Vow: We'll Still Be Heard*,
11 LEGAL TIMES, Dec. 15, 2003, at 12.

12 CFG PAC sends to candidates earmarked contributions solicited by CFG from its
13 supporters. Supporters write checks to candidates based on CFG's recommendations and mail
14 the checks to CFG, which appears to forward the checks to CFG PAC.⁴ After recording how
15 much money is raised for each candidate, CFG PAC bundles its supporters' contributions and
16 sends the contributions to each campaign with the checks of others who contributed to the same
17 candidate. See Steve Chapman, *The Unadvertised Effects of Campaign Reform*, at
18 <http://www.townhall.com/columnists/stevechapman/printsc20020221.shtml> (Feb. 21, 2002).
19 CFG PAC also gives direct contributions to candidates in highly competitive races. See Election

that CFG accepted corporate contributions on at least four occasions. See Public Citizen 527 Group Donor Database, at <http://www.citizen.org/congress/forms/527search.cfm> (last modified Jan. 6, 2003).

⁴ CFG's membership bulletins and fundraising solicitations request that members mail contributions to CFG, not CFG PAC. See Club Candidates for 2002, at <http://www.clubforgrowth.com/candidates/candidates.html> (last visited Oct. 30, 2003) (instructing members to send earmarked contributions to CFG) (archived web page)

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1 2000 Wrap-Up, at <http://www.clubforgrowth.org/news/wrapup.html> (last visited Oct. 30, 2003)
2 (archived web page).

3 During the 2002 election cycle, CFG PAC forwarded at least \$3.2 million in bundled
4 contributions from CFG supporters to endorsed candidates, and CFG itself spent several million
5 dollars on polling and advertising. See Matt Bai, *Fight Club*, N.Y. TIMES MAG., Aug. 10, 2003,
6 at 24. In 2002, CFG PAC was the number one non-party source of campaign funds for
7 Republican candidates, outranking the first- and second-ranked corporate PACs combined. See
8 The Club for Growth's Record in the 2002 Elections, at [http://www.clubforgrowth.org/](http://www.clubforgrowth.org/record.php)
9 record.php (last visited Oct. 23, 2003). For the 2004 election cycle, CFG plans to raise \$20
10 million, twice the total amount generated in the 2002 cycle, and states that it will spend much of
11 that money to fund challenges to fiscal moderates in Republican Senate primaries. See Nicolas
12 Thompson, *Attacks on Fiscal Moderates Fuel Battles within GOP*, BOSTON GLOBE, May 19,
13 2003, at A3.

14 3. Club for Growth Advocacy

15 CFG also has a 501(c)(4) arm, CFG Advocacy, which conducts lobbying. See Public
16 Citizen, *Déjà Vu Soft Money*, <http://www.citizen.org/documents/527nonpoliticianreport.pdf>
17 (Apr. 2002). Little publicly available information exists about this entity or the scope of its
18 activities. In January 2003, CFG Advocacy convened an economic summit to brief members of
19 Congress on the economy, tax cuts, and Social Security. See *Club for Growth Advocacy*
20 *Convenes Economic Summit to Brief Members of Congress, Discuss Priorities for 2003*, U.S.
21 NEWSWIRE, Jan. 24, 2003. In March 2003, CFG President Stephen Moore sent a letter to House
22 members on behalf of CFG Advocacy, urging them to support two budget resolutions providing
23 full funding of President Bush's tax cut – the letter concludes, "Those in Congress who support

1 free-market economic growth policies should support the Toomey budget and the Nussle budget.
2 *We will be watching.* Letter from The Club for Growth Advocacy to the House Republicans,
3 U.S. NEWswire, Mar. 19, 2003 (emphasis added).

4 During the Medicare prescription drug debate, CFG Advocacy polled seniors about their
5 support for the benefit plan supported by President Bush and then lobbied Congress against it,
6 and House members endorsed by CFG supported an alternative bill that would have authorized
7 private health savings accounts. See Letter to Members of Congress, <http://www.clubforgrowth.org/031119-medicarepoll-letter.htm> (Nov. 19, 2003); Robert Novak, *Arm Twisting on Medicare*
8 *Bill May Haunt*, AUGUSTA CHRON., Nov. 28, 2003, at A4. CFG also urged the Senate to defeat
9 the 2004 Omnibus Spending Bill, which it termed the "drunken sailor budget." See Conservative
10 Leaders Condemn Spending Package, <http://www.clubforgrowth.org/news/040115.htm> (Jan. 15,
11 2004).
12

13 **B. Selection of Candidates for Endorsement or Defeat and Financing of**
14 **Advertisements**

15 During each election cycle, CFG conducts extensive research on dozens of federal
16 candidates. CFG interviews the candidates personally and organizes candidate forums at which
17 CFG supporters question candidates on various policy positions and help select the candidates
18 that CFG will endorse. See Matt Bai, *Fight Club*, N.Y. TIMES MAG., Aug. 10, 2003, at 24; see
19 also Candidate Forum Agenda, <http://www.clubforgrowth.org/candidates/020223-bulletin.html>
20 (Feb. 23, 2002) (archived web page). In addition, CFG sends an experienced researcher into the
21 candidate's district to interview people who know the candidate and to analyze the candidate's
22 record as a public official or activist. See *How We Will Make a Difference*, at [http://www.](http://www.clubforgrowth.org/how.php)
23 [clubforgrowth.org/how.php](http://www.clubforgrowth.org/how.php) (last visited Nov. 26, 2003). CFG's Board of Directors then selects

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1 10 to 20 candidates to endorse based on two criteria: (1) the candidate's commitment to free
2 market-based policy ideals and (2) the closeness of the race in which the candidate is running.
3 See Club for Growth Mission Statement, at <http://www.clubforgrowth.org/mission.html> (last
4 visited Oct. 21, 2003) (archived web page). CFG provides assessments of the selected candidates
5 to its supporters, recommends particular candidates, and encourages its supporters to donate at
6 least \$100 to one or more candidates. See What We Can Do, at [http://www.clubforgrowth.org/](http://www.clubforgrowth.org/what.html)
7 [what.html](http://www.clubforgrowth.org/what.html) (last visited Oct. 21, 2003) ("[Y]ou can make your own decisions about whom to
8 support... with the assurance that the candidates are strongly committed to the ideas we care
9 about and have a reasonable shot at winning.") (archived web page).

10 CFG monitors the voting behavior of members of Congress. By notifying the members
11 of Congress in advance as to which votes it will examine, CFG seeks to discipline the way
12 members of Congress vote on budget and tax issues and thereby further its policy agenda. *Id.* As
13 a means of further enforcing this discipline, CFG backs primary challenges by fiscally
14 conservative candidates against moderate Republican lawmakers who consistently vote against
15 CFG's policies. See David Firestone, *Republicans Have Tax-Cutting Ax to Grind with One*
16 *Another*, N.Y. TIMES, Apr. 23, 2003, at A28. CFG states that its goal is to have a Congress with
17 100 or more candidates successfully enacting its pro-growth policies. See What We Can Do, at
18 <http://www.clubforgrowth.org/what.html> (last visited Oct. 21, 2003) (archived web page); see
19 also How We Will Make A Difference, at <http://www.clubforgrowth.com/how.php> (last visited
20 Nov. 17, 2003) ("And of course, we are constantly looking to increase the GOP majority in the
21 House and the Senate.").

22 As part of its efforts to increase the number of pro-growth candidates, CFG conducts
23 polls to ascertain which members of Congress are vulnerable to primary or general election

1 challenges. For example, CFG polled registered Republican primary voters in Ohio and Maine in
2 2003 to ascertain whether they would support a primary opponent more fiscally conservative than
3 Senators George Voinovich and Olympia Snowe, both of whom opposed President Bush's tax
4 plan. *See Club for Growth, GOP Mods Clash Over Tax Cut Surveys*, CONG. DAILY, May 6,
5 2003. Based on the results of the Ohio poll, CFG unsuccessfully attempted to recruit former
6 Representative John Kasich and Ohio Secretary of State Ken Blackwell to mount a conservative
7 primary challenge to Voinovich in 2004. *See For the Record*, NAT'L REV., May 19, 2003, at 2.
8 The Republican Main Street Partnership, a group of moderate Republicans, disputed the results
9 of these polls, charging that they were actually "push polls" designed to obtain desired answers
10 from people using misleading questions, and that they sought to influence voters' perceptions of
11 the Senators rather than to measure public opinion. *See Nicolas Thompson, Attacks on Fiscal*
12 *Moderates Fuel Battles Within GOP*, BOSTON GLOBE, May 19, 2003, at A3; Carl Weiser,
13 *Conservative Group Pressures Voinovich to Back Bush Tax Cut*, GANNETT NEWS SERVICE, May
14 7, 2003.

15 CFG has similarly sought to sponsor – and has actively sponsored – primary challengers
16 to other moderate incumbents. CFG President Stephen Moore unsuccessfully attempted to
17 recruit Representative Jeff Flake to run against Senator John McCain in Arizona, boasting, "If we
18 can convince Jeff to run against McCain... I can raise a million dollars for him." *See RINO*
19 *Hunter*, AM. SPECTATOR, Nov.-Dec. 2002; *see also Jackie Calmes, Washington Wire*, WALL ST.
20 J., Jan. 10, 2003, at A4. In Pennsylvania, CFG has "heavily subsidized" the primary challenge to
21 four-term Senator Arlen Specter by Representative Pat Toomey. *See Neil Lewis, Clout Shifts*
22 *with the Change in Campaign Finance Rules*, N.Y. TIMES, Sept. 8, 2003, at A19; *see also Carrie*
23 *Budoff, Out-of-State Money Pours into Toomey-Specter Race*, PHILA. INQUIRER, Mar. 18, 2004,

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1 at A1 ("The key for Toomey has been the support of the Club for Growth."). CFG plans to raise
2 at least \$1 million for Toomey in hard money contributions from its members and announced that
3 it will raise at least \$2 million to finance anti-Specter advertisements.⁵ See Douglas Waller, *On*
4 *the Trail of RINOs*, TIME, Sept. 22, 2003, at 20; see also Dick Polman, *Now It's Republicans*
5 *Quarreling as Right Wing Targets Moderates*, PHILA. INQUIRER, Jul. 6, 2003, at C1. In early
6 2003, CFG "actively jumped into" the 2004 election cycle by "scouring the field" for candidates
7 in developing House and Senate races. CFG Executive Director David Keating announced that
8 his organization was recruiting fiscally conservative Republicans to run for key House and
9 Senate seats, including a primary challenge to Representative Amo Houghton, a moderate
10 Republican representing New York's 29th Congressional District. See *Club for Growth Hits*
11 *Airwaves, Targets Open Seats in 2004*, CONG. DAILY, Apr. 23, 2003.

12 Most notably, CFG sponsored a primary challenge to 10-term Congresswoman Marge
13 Roukema by conservative New Jersey Assemblyman Scott Garrett in 2000. See Adam Geller,
14 *Roukema Edges Out Garrett in the 5th*, THE RECORD, Jun. 7, 2000, at A1. CFG president
15 Stephen Moore publicly declared that CFG was prepared to spend \$500,000 on Garrett's behalf
16 to defeat Roukema. See Eliza Newlin Carney, *Right on the Money?*, NAT'L J., Oct. 26, 2002. In
17 reality, CFG spent more than \$100,000 on television and radio advertisements attacking
18 Roukema's record on tax issues and solicited \$150,000 in earmarked contributions from its
19 supporters. See Greg Pierce, *Inside Politics*, WASH. TIMES, May 24, 20002, at A8; see also
20 *McConnell v. FEC*.

⁵ On February 12, 2004, CFG unveiled an advertisement that criticizes Senator Specter for voting with Senator John Kerry 70% of the time and concludes, "That makes Arlen Specter 100% too liberal!" See Script for "Guess Who's Raising Your Taxes," at <http://www.clubforgrowth.org/advertising/guess-who-script.php> (last visited Feb. 11, 2004). CFG budgeted \$150,000 for the advertisement, which ran on select Pennsylvania broadcast stations

Roukema won by fewer than 1,500 votes,

but retired in 2002. See Jeff Diamant & Donna Leusner, *Garrett, Other Republicans Line Up to Succeed Roukema*, STAR-LEDGER, Dec. 6, 2001, at 30. In 2002, Scott Garrett won the seat vacated by Roukema with substantial financial backing from CFG, including \$134,000 in advertising disbursements, \$278,000 in bundled contributions solicited from supporters, and a CFG-sponsored poll of likely Republican primary voters. See Elizabeth Cooper, *Fighting for Soul of GOP*, OBSERVER-DISPATCH, Sept. 21, 2003, at A1; see also *At the Races*, ROLL CALL, Jan. 24, 2002.

During the 2000 election cycle, CFG spent a total of \$850,000 on advertising to benefit recommended candidates.

In Florida's 8th Congressional District, CFG ran \$90,000 of advertising during the final days of the Republican runoff primary between Ric Keller and Bill Sublette, as well as an "aggressive" phone bank operation that completed more than 40,000 calls in the four days before the election.⁶

and on cable channels statewide. See Club for Growth Press Release, at <http://www.clubforgrowth.org/news/040212.php> (Feb. 12, 2004).

⁶ CFG ran several advertisements in Florida's 8th Congressional District during the Keller-Sublette runoff primary that appear to constitute express advocacy, which are discussed *infra* at Section III.B.2(b). CFG also spent \$120,212 on the following television advertisement, which aired within 30 days of the runoff primary:

I hear about how well the economy is doing but my husband and I are working harder than ever. Taxes are a big issue for us. That's why I was so upset when I read that Bill Sublette was the only Republican to vote to allow higher property taxes. Fortunately Ric Keller is a fighter for lower taxes and a simpler tax system. In the election for Congress there is a clear choice: higher taxes with Bill Sublette or lower taxes with Ric Keller.

In addition, CFG spent \$39,631 on its phone bank operation in Florida's 8th Congressional District, which included the following message:

Hi, this is Congressman Dave Weldon from Florida's 15th congressional district, located on the Space Coast. There is a Republican primary election Tuesday to choose the candidate best suited to carry on Bill McCollum's conservative values in Congress. I know Ric Keller, and he is a great candidate. Ric Keller

1 CFG spent an additional \$90,000 in advertisements targeting the "pro-tax" positions of Keller's
2 general election opponent, Linda Chapin. See Memorandum to Club for Growth Members,

3 In a fundraising letter cited in the complaint, Keller himself
4 attributed his victory to CFG's advertising efforts on his behalf. See Club for Growth
5 Fundraising Letter, ("The Club for Growth endorsed my candidacy
6 when many others believed I had no chance to win... I was a non-establishment candidate who,
7 thanks to you and the Club for Growth, was able to afford to overcome the attacks from the left
8 by using TV ads to spread the message.").

9 In the 2002 election cycle, CFG spent \$560,000 on advertising campaigns directed toward
10 specific House candidates in Iowa, Indiana, New Jersey and Utah, with the majority of this
11 amount used to fund candidate-centered advertisements that ran in the last 60 days before the
12 general election.⁷ See KEN GOLDSTEIN & JOEL RIVLIN, POLITICAL ADVERTISING IN THE 2002
13 ELECTIONS 39-43 (forthcoming 2004) (<http://www.polisci.wisc.edu/tvadvertising>). CFG also

will fight for lower taxes. He has the courage to stand up to the special interests in Washington – so you can keep more of your hard earned money. Ric Keller is a true Reagan Republican who would make a great conservative congressman in Washington fighting alongside me for our values. Please, remember to vote in Tuesday's primary. Thank you for listening to this message, paid for by the Republican Club For Growth.

⁷ In 2002, CFG funded television advertisements supporting its recommended candidates or attacking their opponents during the Republican House primary elections in Iowa, Indiana and New Jersey. See Club for Growth Past Projects, at <http://www.clubforgrowth.org/pastproject.php> (last visited Feb. 11, 2004). CFG spent \$100,000 to air advertisements in Tennessee's 7th Congressional District during the 2002 general election touting the anti-tax credentials of State Senator Marsha Blackburn. See *New Member Profile: Marsha Blackburn*, NAT'L J., Nov. 9, 2002; Script for "Standing Up," at <http://www.clubforgrowth.org/advertising/blackburn-script.php> (last visited Feb. 11, 2004). CFG similarly ran advertisements during the general election in Utah's 2nd Congressional District, attacking the Democratic incumbent, Jim Matheson, as a pro-tax liberal. CFG supplemented these advertisements with bundled contributions. For example, CFG PAC sent Republican challenger John Swallow \$125,844 in bundled contributions. See Bob Bernick, Jr. & Amy Joi Bryson, *Campaign Ad Finale Has Surprises*, DESERET NEWS, Nov. 1, 2002, at A17; Club for Growth Bulletin, <http://www.clubforgrowth.org/members-only/021115.php> (Nov. 15, 2002). In 2003, CFG PAC sent approximately \$150,000 in bundled contributions to John Swallow, who is favored to win the 2004 Republican House primary and who seeks a rematch of his 2002 race with Matheson, which Swallow lost by 1,600 votes. See *Club for Growth Helps Swallow Treasury Grow*, ROLL CALL, Feb. 11, 2004, at 10.

1 appears to have spent an additional \$600,000 on its advertising campaign attacking Democratic
2 Senate candidates in Texas, Arkansas, South Dakota, New Hampshire, Colorado and Missouri
3 for their opposition to President Bush's tax plan by comparing them to "bobblehead" dolls of
4 Senators Hillary Clinton, Edward Kennedy and Tom Daschle and concluding "Say 'No' to the
5 Daschle Democrats." See Club for Growth Press Release, [http://www.clubforgrowth.com/](http://www.clubforgrowth.com/advertising/daschle-2-press.php)
6 [advertising/daschle-2-press.php](http://www.clubforgrowth.com/advertising/daschle-2-press.php) (Oct. 23, 2002). In the week before the general election, CFG
7 intensified its spending on radio advertisements, expending \$230,000 on advertisements touting
8 the fiscally conservative credentials of recommended candidates or attacking their Democratic
9 opponents as "pro-tax" in six competitive House races. See *Club for Growth Boosts Spending in*
10 *Close House Races*, CONG. DAILY, Nov. 1, 2002.

11 CFG recently weighed in on the race for the 2004 Democratic Presidential nomination.
12 Its new website, MoveRight.org, is a \$5 million fundraising effort aimed at countering
13 MoveOn.org, an organization raising money to fund anti-Bush advertisements in key
14 battleground states during the 2004 Presidential election. See Andrew Mollison, *Anti-Dean Ad*
15 *Gets Grins and Grumbles*, ATLANTA J.-CONST., Jan. 8, 2004, at A3. This website characterizes
16 the Democratic candidates as a "Sorry Group" of "Liberal Losers" who hold irrational positions
17 and nonsensical beliefs and details the positions of each Democratic candidate on various issues,
18 providing a point-by-point rebuttal of candidate statements with which it disagrees. See *The*
19 *Sorry Group*, at <http://www.clubforgrowth.org/moveright> (last visited Feb. 2, 2004). The site
20 also includes candidate scorecards from various conservative groups, as well as a Dean Tax Hike
21 Calculator purportedly designed to compute how much "hard-earned money Howard Dean wants
22 to steal from you" by taking into account individual income and withholding amounts. See *Dean*

1 Tax Hike Calculator, at <http://www.clubforgrowth.org/taxsavings2004.php> (last visited Feb. 2,
2 2004).

3 Indeed, Howard Dean occupied much of CFG's recent focus. In December 2003, CFG
4 ran an advertisement comparing Howard Dean's tax policy to that of George McGovern, Walter
5 Mondale and Michael Dukakis, former Democratic Presidential candidates. The advertisement
6 charged that Howard Dean would raise taxes by \$1,933 per family, and features a timeline of
7 failed Democratic Presidential candidates with "Rejected" stamped under each of their pictures.
8 See Script for Tax Redux, at <http://www.clubforgrowth.org/advertising/dean-script.php> (last
9 visited Feb. 2, 2004). This advertisement began running on December 4, 2003 on Des Moines,
10 Iowa and Manchester, New Hampshire broadcast stations and on cable news channels in both
11 states – CFG budgeted more than \$100,000 for the advertising campaign and funded the
12 advertising buy with soft money. See Club for Growth Press Release, <http://www.clubforgrowth.org/advertising/dean-release.php> (Dec. 3, 2003). The advertisements aired for approximately two
13 weeks, ending prior to each state's 30-day period for electioneering communications. See Glen
14 Justice & Jim Rutenberg, *New Ad Ban in Campaign Takes Effect in Iowa Today*, PITT. POST-
15 GAZETTE, Dec. 20, 2003, at A7; *Conservative Club's Ad Flays Dem Front Runner*, HOUS.
16 CHRON., Dec. 5, 2003, at A18. CFG's advertising campaign led Howard Dean to respond with a
17 commercial refuting the attack. See Howard Kurtz, *Dean's Ads Get Fiscal*, WASH. POST, Dec. 5,
18 2003, at A4.

19
20 Since the Supreme Court's decision in *McConnell*, CFG reportedly has relied on its PAC
21 to air advertisements during the electioneering communications period. See Glen Justice & Jim
22 Rutenberg, *Special Interests Unfazed by New Campaign Limits*, N.Y. TIMES, Dec. 20, 2003, at
23 A14. Using \$100,000 in hard dollar contributions, CFG PAC ran a highly-publicized advertising

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1 campaign in Des Moines, Iowa in advance of the Iowa caucuses, urging Howard Dean to take his
2 "left-wing freak show back to Vermont." See Club for Growth Press Release, [http://www.](http://www.clubforgrowth.org/advertising/iowa-dean-release.php)
3 [clubforgrowth.org/advertising/iowa-dean-release.php](http://www.clubforgrowth.org/advertising/iowa-dean-release.php) (Jan. 7, 2004). CFG Executive Director
4 David Keating admitted that the organization was "really aiming at the general election with the
5 ad." See Sharon Theimer, *Dean Capitalizes on Campaign Attacks*, AP NEWSWIRE, Jan. 13, 2004.
6 CFG also has pledged to use its PAC to fund commercials characterizing Democratic
7 Presidential candidate John Kerry as a "tax-loving, big government spender" in advertisements
8 slated to run during Southern primaries. See Shailagh Murray, *The Race to Define Kerry is On*,
9 WALL ST. J., Feb. 2, 2004, at A4; Bill Walsh, *Campaign Finance Law Fueling Stealth Attack*
10 *Ads*, TIMES-PICAYUNE, Feb. 23, 2004, at A1.

11 **III. LEGAL ANALYSIS**

12 **A. Daschle Electioneering Communications**

13 The complaint alleges that CFG violated the ban on corporate financing of
14 "electioneering communications" by broadcasting advertisements that attack Senator Tom
15 Daschle for opposing President Bush's tax plan. See Compl. at 1-2. According to the complaint,
16 these advertisements contravened the terms of the statutory test for "electioneering
17 communications" upheld by the district court in the *McConnell* litigation. See Compl. at 1.⁸

18 The text of the advertisement run by CFG in South Dakota criticizing Senator Daschle is
19 as follows:

⁸ CFG began running advertisements in Maine, Ohio and Nebraska for the ostensible purpose of pressuring Senators from those states to support President Bush's proposed tax legislation on May 7, 2003. See *Federal Complaint Filed Over Anti-Daschle Ads*, ABERDEEN AM. NEWS, May 14, 2003, at 1B. On May 12, 2003, CFG began airing a nearly identical commercial in South Dakota, criticizing Senator Daschle's position on the Bush tax cuts. Compl. at 1. CFG spent approximately \$50,000 on these advertisements. See David Kranz, *Group Targets Daschle in TV Ads*, ARGUS LEADER, May 13, 2003, at B1.

Audio	Visual
PRESIDENT KENNEDY CUT INCOME TAXES AND THE ECONOMY SOARED.	<i>Footage of Kennedy labeled "President Kennedy"</i> <i>On screen: "Cut Income Taxes and the Economy Soared"</i>
PRESIDENT REAGAN CUT TAXES MORE, AND CREATED 15 MILLION NEW JOBS.	<i>Footage of Reagan labeled "President Reagan"</i> <i>On screen: "Cut Taxes More, and Created 15 Million New Jobs"</i>
PRESIDENT BUSH KNOWS TAX CUTS CREATE JOBS, AND THAT HELPS BALANCE THE BUDGET.	<i>Footage of Bush labeled "President Bush"</i> <i>On screen: "Knows Tax Cuts Create Jobs, and That Helps Balance The Budget"</i>
BUT SENATOR TOM DASCHLE OPPOSES THE PRESIDENT.	<i>Daschle photo.</i> <i>On screen: "But Senator Tom Daschle opposes the President"</i>
SOUTH DAKOTA HAS LOST THOUSANDS OF JOBS, AND PRESIDENT BUSH HAS A PLAN TO HELP.	<i>Images of closed storefronts.</i> <i>On screen: "South Dakota Unemployed up 1,206 in last two years"</i>
TELL TOM DASCHLE TO SUPPORT THE KENNEDY, REAGAN, BUSH TAX POLICY THAT WILL BRING JOBS BACK TO SOUTH DAKOTA.	<i>Daschle photo. On screen: "Tell Tom Daschle"</i> <i>Daschle picture fades as Kennedy, Reagan, and Bush pictures come up.</i> <i>On screen: "Bring Jobs Back to South Dakota"</i>
	PAID FOR BY THE CLUB FOR GROWTH www.clubforgrowth.org

1 *See Compl. at 2; Resp. at 2.*

2 According to Stephen Moore, the president of CFG, the South Dakota advertisement
3 focused on influencing Senator Daschle's vote on President Bush's tax cut legislation rather than
4 affecting the 2004 campaign. *See David Kranz, Group Targets Daschle in TV Ads, ARGUS*
5 *LEADER*, May 13, 2003, at B1. Mr. Moore reportedly admitted, however, that Daschle's support
6 for the tax cut was unlikely, and that CFG intended the advertisements to underscore Daschle's
7 stance in a state that voted for President Bush in 2000. *See Daschle Targeted Again, ABERDEEN*
8 *AM. NEWS*, May 13, 2003, at 5A. Mr. Moore also stated that South Dakota was not an original
9 location for the advertising campaign, but that CFG decided to run advertisements in South

1 Dakota because "Tom Daschle is the leader of the opposition, and we knew that it would get
 2 picked up nationally that we were attacking Daschle on his home turf."⁹ See Kranz, *supra*.

3 In its response to the complaint, CFG argues that the complaint was based on the backup
 4 definition of "electioneering communications" that was in effect for 17 days between the district
 5 court's decision in *McConnell* and its subsequent stay of that decision, and that the backup
 6 definition is unenforceable because the Commission did not promulgate regulations to implement
 7 it. Resp. at 4. CFG further argues that, even if the backup definition is enforceable, the South
 8 Dakota advertisements would not violate the Act because Senator Daschle had not filed a
 9 Statement of Candidacy for the 2004 election at the time of the complaint and, therefore, was not
 10 a candidate. *Id.* at n.2. Although CFG does not explicitly argue that the advertisement in
 11 question constitutes pure issue advocacy, its response does state that the advertisement addressed
 12 legislation pending in Congress at the time of its airing and CFG stated publicly that the

⁹ In August 2003, CFG launched another advertisement attacking Senator Daschle for his purchase of a \$2 million house in Washington, D.C. See August 2003 Script for "Foxhall Road," at <http://www.clubforgrowth.org/advertising/foxhall-script.php> (last visited Oct. 23, 2003). CFG timed this campaign to coincide with Daschle's annual road trip through South Dakota, and CFG President Stephen Moore declared at the time the advertisements aired that "Daschle is target No. 1" until November 2004. See Jeff Zeleny, *Right's Sights on Daschle*, ABERDEEN AM. NEWS, Aug. 24, 2003, at 5A.

CFG appears to have repeatedly targeted Senator Daschle. In 2002, CFG polled South Dakota voters about their perceptions of Senator Daschle, concluding that he was "grossly out of step with his constituents on the issue of taxes, spending and the economy." See South Dakotans Oppose Daschle's Attempts to Block Bush's Tax Cut and Stimulus Package, <http://www.clubforgrowth.org/articles/020204.html> (Feb. 4, 2002) (archived web page). Following this poll, CFG began airing advertisements that criticized Daschle for voting against President Bush's tax cut. Although ostensibly for the purpose of pressuring Senator Daschle to change his vote, these advertisements were reportedly intended in part to influence the 2002 general election race between incumbent Senator Tim Johnson and his Republican challenger, John Thune, a race widely perceived as a proxy battle between President Bush and Senator Daschle. See Alison Mitchell, *South Dakota Senate Campaign: Bush Versus Daschle (By Proxy)*, N.Y. TIMES, Apr. 2, 2002, at A24. Indeed, several news articles reported that the underlying goal of CFG's 2002 advertising campaign was to damage Daschle's popularity prior to the 2004 race, prompting voters to oust Daschle as Senate Majority Leader and replace him with a Republican. See Scott Waltman, *Daschle Gets Used to Feeling the Heat*, ABERDEEN AM. NEWS, Feb. 22, 2002, at 1A; Robin Toner, *South Dakota Takes Center Stage in Political Wars*, N.Y. TIMES, Jan. 27, 2002, at A24. Consistent with this goal, CFG recently stated that it will air advertisements attacking Senator Daschle as "anti-family, anti-farmer and anti-American" in connection with the 2004 Senate race. See Wendy Melillo, *Going After Liberals and Your Funny Bone*, ADWEEK, Feb. 2, 2004, at 11 ("[T]he group deals primarily in attack ads to weaken candidates it opposes.").

1 advertisements are "genuine issue ads." Resp. at 3; *see also Federal Complaint Filed Over Anti-*
2 *Daschle Ads*, ABERDEEN AM. NEWS, May 14, 2003, at 1B (quoting Club for Growth Executive
3 Director David Keating).

4 The Act prohibits corporations from making contributions or expenditures from their
5 general treasury funds in connection with a federal election. 2 U.S.C. § 441b(a). The Bipartisan
6 Campaign Reform Act of 2002 ("BCRA") amended § 441b by extending the prohibition on the
7 use of corporate treasury funds to the financing of electioneering communications. *See* 2 U.S.C.
8 § 441b(b)(2); 11 C.F.R. § 114.2(b)(1); *see also* Electioneering Communications, 67 Fed. Reg.
9 65,190, 65,203 (2002) (amending 11 C.F.R. parts 100 and 114). BCRA defines "electioneering
10 communications" as broadcast, cable or satellite communications that: (1) refer to a clearly
11 identified Federal candidate; (2) are transmitted within 60 days before a general or 30 days before
12 a primary election; and (3) are targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(i).¹⁰
13 BCRA also provided a backup definition intended to take effect in the event the primary
14 definition in subparagraph (i) was held to be constitutionally insufficient:

15 [T]he term 'electioneering communication' means any broadcast,
16 cable, or satellite communication which promotes or supports a

¹⁰ The full text of the primary definition is as follows:

- (i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which—
 - (I) refers to a clearly identified candidate for Federal office;
 - (II) is made within—
 - (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
 - (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has the authority to nominate a candidate, for the office sought by the candidate; and
 - (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(i).

1 candidate for that office, or attacks or opposes a candidate for that
2 office (regardless of whether the communication expressly
3 advocates a vote for or against a candidate) and which also is
4 suggestive of no plausible meaning other than an exhortation to
5 vote for or against a specific candidate.

6 2 U.S.C. § 434(f)(3)(ii).

7 On May 2, 2003, the district court issued its decision in *McConnell v. FEC*, 251 F.
8 Supp.2d 176, 184-85 (D.D.C. 2003) (per curiam), and declared the primary definition of
9 “electioneering communications” unconstitutional by a 2-1 vote. The court upheld the backup
10 definition, but struck the final clause of subparagraph (ii), which Judge Leon deemed
11 unconstitutionally vague.¹¹ *Id.* at 802 (Leon, J., concurring). Consequently, under the district
12 court’s truncated backup definition, an “electioneering communication” constituted any
13 broadcast, cable, or satellite communication that promotes or supports a candidate for that office,
14 or attacks or opposes a candidate for that office without respect to any temporal or geographical
15 limitations. *Id.*

16 On May 19, 2003, the district court stayed its decision, resurrecting the primary definition
17 of “electioneering communication” set forth in § 434(f)(3)(i). *McConnell v. FEC*, 253 F.
18 Supp.2d 18, 21 (D.D.C. 2003). As a result, prior to the issuance of the Supreme Court’s opinion,
19 the truncated backup definition was in effect for the 17 days between the district court’s decision
20 on May 2, 2003, and its subsequent stay of that decision. It was within this window that CFG
21 aired the anti-Daschle advertisements that form the basis of the instant complaint.

¹¹ Judge Kollar-Kotelly upheld the primary definition as constitutional and concurred with Judge Leon’s conclusion solely as an alternative to the Court’s finding that the primary definition was unconstitutional. *Id.* at 650 (Kollar-Kotelly, J., concurring). Judge Henderson ruled that the ban on corporate and labor disbursements for electioneering communications was unconstitutional in its entirety based on its restriction of speech that is not express advocacy. *Id.* at 361-62.

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1 On December 10, 2003, the Supreme Court issued its decision in *McConnell*, upholding
2 BCRA's electioneering communications disclosure requirements and source restrictions in their
3 entirety. *See McConnell v. FEC*, 124 S. Ct. 619, 686-89 (2003). Deeming the primary definition
4 constitutional, the Court stated:

5 Finally we observe that new FECA § 304(f)(3)'s definition of
6 "electioneering communication" raises none of the vagueness
7 concerns that drove our analysis in *Buckley*. The term
8 "electioneering communication" applies only (1) to a broadcast (2)
9 clearly identifying a candidate for federal office, (3) aired within a
10 specific time period, and (4) targeted to an identified audience of at
11 least 50,000 viewers or listeners. These components are both
12 easily understood and objectively determined. Thus, the
13 constitutional objection that persuaded the Court in *Buckley* to
14 limit FECA's reach to express advocacy is simply inapposite.

15 *Id.* at 689 (internal citation omitted). Upholding BCRA's source restrictions on disbursements
16 for electioneering communications, the Court further asserted:

17 [I]ssue ads broadcast during the 30- and 60-day periods preceding
18 federal primary and general elections are the functional equivalent
19 of express advocacy. The justifications for the regulation of
20 express advocacy apply equally to ads aired during those periods if
21 the ads are intended to influence the voters' decisions and have that
22 effect.

23 *Id.* at 696-97.

24 As a result of the Supreme Court's decision, the primary definition of "electioneering
25 communications" set forth in 2 U.S.C. § 434(f)(3)(i) determines which advertisements are
26 subject to BCRA's prohibition on the use of corporate and labor union general treasury funds.
27 *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a
28 rule of federal law to the parties before it, that rule is the controlling interpretation of federal law
29 and must be given full retroactive effect in all cases still open on direct review and as to all
30 events, regardless of whether such events predate or postdate our announcement of the rule.").

1 Under the primary definition, the advertisements broadcast by CFG in South Dakota do not
2 constitute "electioneering communications." Although the Club's advertisements meet several
3 of the primary definition's requirements – they were publicly distributed via television broadcast,
4 were targeted to the relevant electorate, and referred to a clearly identified candidate – they fail in
5 one important respect: the South Dakota advertisements did not run within 60 days before a
6 general election or 30 days before a primary election.¹² South Dakota's Congressional primary
7 is tentatively scheduled for June 1, 2004, and the advertisements in question aired more than one
8 year prior to that date. *See* 2004 Preliminary Presidential and Congressional Primary Dates,
9 <http://www.fec.gov/pages/2004pdates.htm> (Feb. 11, 2004).

10 Accordingly, there is no reason to believe that CFG violated 2 U.S.C. § 441b by using
11 corporate general treasury funds to broadcast electioneering communications.

12 **B. Political Committee Status**

13 The complaint alleges that CFG raises and spends money to influence federal elections
14 but has failed to register as a political committee with the Commission and comply with the
15 Act's reporting requirements. According to the complaint, CFG's major purpose is to influence
16 federal elections. CFG bluntly discusses its electioneering activities on its website and solicits
17 contributions through fundraising letters like the following signed by Republican Congressman
18 Ric Keller, on whose behalf CFG ran advertisements criticizing his 2000 primary and general
19 election opponents:

¹² CFG's claim that Senator Daschle was not a candidate at the time the advertisement was aired is inaccurate. Senator Daschle filed his Statement of Candidacy on December 3, 1998. Further, under the Act, the definition of "candidate" includes any individual who seeks election – that is, has received contributions or made expenditures in excess of \$5,000 or has given consent to another person to receive such contributions or make such expenditures. 2 U.S.C. § 431(2). At the end of 2003, Senator Daschle had received contributions totaling \$2.02 million at the end of 2003, made \$1.1 million in expenditures, and had \$3.89 million cash on hand. *See* David Kranz, *Finance Laws May Affect Senate Election*, ARGUS LEADER, Feb. 5, 2004, at A1. As a result, Senator Daschle constitutes a candidate for purposes of the Act.

1 The Club for Growth selected my race as one of its top priorities...
2 Since the Club targets the most competitive races in the country,
3 your membership in the Club will help Republicans keep control of
4 Congress.

5 Compl. at 3 (citing *McConnell*, 251 F. Supp.2d at 557 (Kollar-Kotelly, J., concurring) (finding

6 2.7.4) The complaint states that contributions received in response to

7 such solicitations should trigger political committee status once they total more than \$1,000, but

8 that CFG has declined to register as a political committee to avoid having to report the soft

9 money contributions it receives from wealthy benefactors. *Id.* CFG does not address this

10 allegation in its response, nor has it commented publicly on the allegation that its fundraising

11 activities trigger political committee status. *See* Denise Ross, *Democrats File Complaint Against*

12 *Daschle*, RAPID CITY J., May 15, 2003, at 5.

13 The Act defines a political committee as any committee, club, association, or other group

14 of persons that receives contributions or makes expenditures aggregating in excess of \$1,000

15 during a calendar year. 2 U.S.C. § 431(4)(A). Contributions and expenditures are broadly

16 defined – these terms include anything of value that is given or received for the purpose of

17 influencing a federal election. *See* 2 U.S.C. § 431(8)(A), (9)(A). Pursuant to the Act, an

18 organization that qualifies as a political committee must register with the Commission by

19 submitting a statement of organization within ten days of designation and report receipts and

20 disbursements on a periodic basis. *See* 2 U.S.C. §§ 433, 434.

21 Courts have ruled that in addition to the statutory requirement of spending or receiving

22 more than \$1,000, the organization's major purpose must be campaign activity, such as the

23 nomination or election of a candidate, to qualify as a political committee. *See, e.g., Buckley v.*

24 *Valeo*, 424 U.S. 1, 79 (1976) ("*Buckley*"); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238,

1 262 (1986) (“*MCFL*”). *But see Akins v. FEC*, 101 F.3d 731, 740-42 (D.C. Cir. 1996), *vacated on*
2 *other grounds*, 524 U.S. 11 (1998) (holding that the major purpose applied only to independent
3 expenditures, not direct contributions). Accordingly, the Commission has previously articulated
4 that the standard used to determine if an entity should qualify as a political committee is whether,
5 in addition to meeting the statutory requirements, the organization’s major purpose is campaign
6 activity (*i.e.*, making payments or donations to influence any election to public office). *See*
7 Advisory Opinion 1996-3, at 2; *cf. FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C.
8 1996) (confining the major purpose test to federal campaign activity) (“*GOPAC*”).

9 While the major purpose test is a limiting construction on the statutory definition of a
10 “political committee,” in practical effect an organization must both possess the major purpose of
11 campaign activity and meet the statutory threshold to trigger political committee status. *See FEC*
12 *v. Malenick*, 2004 WL 626174, at *3-4 (D.D.C. Mar. 30, 2004) (applying the major purpose test
13 before analyzing contributions meeting the statutory threshold) (“*Triad*”). As a practical matter
14 only, this Factual and Legal Analysis turns first to a description of CFG’s major purpose, then to
15 the expenditures made by CFG that meet the \$1,000 statutory threshold.

16 1. Major Purpose

17 CFG’s major purpose appears to be conducting federal campaign activity. Indeed, CFG’s
18 own public statements indicate that its major, if not sole, purpose is to nominate and elect a slate
19 of pro-growth, fiscally conservative candidates to Congress. *See GOPAC*, 917 F. Supp. at 859
20 (the major purpose of an organization may be shown by public statements of its purpose or by
21 other means, such as its expenditures in cash or in kind to or for the benefit of a particular
22 candidate or candidates) (*citing MCFL*, 479 U.S. at 262).

23 For example, CFG asserts on its website:

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1 As a means to taking control of Congress with pro-economic
2 growth conservatives, the Club for Growth is seeking to double,
3 even triple, our membership over the coming months. After all,
4 our strength is in numbers. *The larger our membership, the more*
5 *muscle and money we'll have to get pro-growth candidates*
6 *elected... And, the more strength we'll have to hold Republicans'*
7 *feet to the fire, so they'll have the courage to make good on their*
8 *promises.* Since we target the most competitive races, *your*
9 *membership in the Club will help Republicans keep control of the*
10 *Congress.* What's more, it will help Republicans keep control by
11 electing leaders committed to the pro-growth, limited government
12 beliefs you share. Not by electing Republicans who vote like
13 Democrats. And, as a member of the Club for Growth, you will be
14 part of an organization whose goal is to defeat status quo
15 incumbents.

16 What's At Stake in the 2004 Elections, at <http://www.clubforgrowth.org/whats.php> (last visited
17 Nov. 14, 2003) (italics in original); *see also* How We Will Make A Difference, at [http://www.](http://www.clubforgrowth.com/how.php)
18 [clubforgrowth.com/how.php](http://www.clubforgrowth.com/how.php) (last visited Nov. 17, 2003) ("And of course, we are constantly
19 looking to increase the GOP majority in the House and the Senate."); Who Are the Members of
20 Club for Growth?, at <http://www.clubforgrowth.org/who.php> (last visited Sept. 29, 2003) ("Club
21 members have a shared goal of contributing to and electing more Reaganites to Congress who are
22 willing to stand for the issues that they as members care about most."). Similarly, CFG President
23 Stephen Moore has made numerous public statements regarding the overtly electoral purpose and
24 goals of CFG:

25 [T]his, ultimately, is what the Club for Growth is after: to be the
26 interest group that controls Republican politics. "The only group
27 that has been jealous of us – I don't know if jealous is the right
28 word, or maybe resentful – is the party itself," Moore said. "They
29 think we're replacing the party, and that is our goal. We want to
30 take over the party's fundraising. We want it to be, in 10 years,
31 that no one can win a Senate or House seat without the support of
32 the Club for Growth."

33 Matt Bai, *Fight Club*, N.Y. TIMES MAG., Aug. 10, 2003, at 24; *see also* Richard Dunham, *The*
34 *Club That's Clubbing Republican Moderates*, BUS. WK., Apr. 1, 2002, at 43 ("The party has its

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1 mission, which is to elect more Republicans. Ours is to elect conservatives,' says Moore, the
2 club's president and a Cato Institute economist."); Max Schulz, *A Shot in the Arm of the Body*
3 *Politic: An Interview with the Club for Growth's Steve Moore*, MONTHLY PLANET, available at
4 <http://www.cei.org/gencon/005,02120.cfm> (Aug. 2, 2001) ("The objective [of the Club for
5 Growth] is to elect more free-market tax cutting candidates to Congress.... We're interested not
6 just in helping elect more pro-growth Republicans but also helping de-elect some of the anti-
7 growth Republicans.")

8
9
10 CFG's actions reinforce its stated mission of electing pro-growth Republicans to
11 Congress. In each election cycle, CFG conducts polls to identify vulnerable members of
12 Congress, recruits potential primary challengers, and endorses Congressional candidates based on
13 a detailed analysis of each candidate's record on tax and fiscal issues and the closeness of the
14 race in which the candidate is running. CFG uses the information it obtains in its analysis to
15 solicit contributions for the candidates from its supporters, as well as to conduct advertising
16 campaigns in key races. *See supra* pp. 5-13.

17 CFG's political activities are similar to those cited by the Commission as evidence of
18 "major purpose" in MUR 4568 (Triad). In that case, the Commission found probable cause to
19 believe that Triad Management Services, Inc. and its predecessors ("Triad") violated the Act by,
20 *inter alia*, failing to register as a political committee and, unable to reach a conciliation
21 agreement with Triad, filed suit in district court. In addition to having made expenditures,
22 solicited contributions for 1996 Congressional candidates, bundled contributions earmarked for
23 federal candidates, and expressly advocated the election or defeat of federal candidates, all of

1 which triggered the statutory threshold for political committee status, Triad's major purpose was
2 to support particular candidates for federal office both in Republican primaries and in the general
3 election.

4 Triad's public statements and extensive political activities evidenced its major purpose as
5 electoral activity. See *Triad*, 2004 WL 626174, at *3-4. In particular, Triad's stated goals were:
6 (1) Return Republican House Freshmen; (2) Increase by 30 the Republican House Majority; (3)
7 Increase Senate Republicans to a Filibuster-proof 60. *Id.* at *3. Indeed, Triad stated numerous
8 times that its purpose was to assemble a team of donors to preserve Republican control of
9 Congress and to advance a conservative agenda.

10 As the linchpin of its efforts to elect conservative candidates, Triad conducted "political
11 audits" of approximately 250 Republican candidates during the 1996 election cycle. These audits
12 involved multiple contacts between Triad and the candidates and allowed Triad to obtain detailed
13 information about the candidates' prospects in the upcoming election, provide advice to
14 candidates about campaign strategy, and ascertain which candidates to support. Based on the
15 results of the audits, Triad provided fundraising assistance to selected campaigns, using "Fax
16 Alerts" to recommend the candidates by name to its donor network. Triad also published an
17 extensive voter guide providing detailed information about recommended House and Senate
18 candidates, who were selected as "top tier" priorities for the 1996 race. This publication
19 contained express advocacy and was distributed to more than 200 prospective donors.

20 Like Triad, CFG's extensive electoral activities and public statements appear to satisfy
21 the major purpose test. CFG solicits contributions for federal candidates, raises and spends
22 money on advertising campaigns that support federal candidates or attack their opponents,
23 conducts polling aimed at ascertaining the vulnerability of moderate House and Senate

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1 incumbents, and recruits primary challengers in selected Congressional districts to run against
2 candidates it opposes. These activities, along with CFG's public statements regarding its mission
3 to elect fiscally conservative candidates to Congress, demonstrate that CFG is overwhelmingly
4 focused on influencing the nomination and election of federal candidates. CFG therefore appears
5 to possess the major purpose of campaign activity, fulfilling at least one prong of the two-part
6 test for political committee status.

7 **2. Expenditures Meeting the Statutory Threshold**

8 CFG has also made expenditures that meet the statutory threshold for political committee
9 status in two ways. First, CFG funded phone bank messages and broadcast advertisements
10 containing express advocacy, spending more than \$120,479 in 2000 and at least \$140,000 during
11 the 2002 election cycle on express advocacy communications to the general public. In addition,
12 CFG's communications to its "members" contained candidate endorsements and other express
13 advocacy. Although such communications would not constitute expenditures if issued by a valid
14 membership organization, CFG, a 527 organization dedicated to electing conservatives to
15 Congress, possesses the primary purpose of influencing federal elections and is prohibited from
16 qualifying as a membership organization under the Commission's regulations. *See* 11 C.F.R. §§
17 100.134(e)(6), 114.1(e)(1)(vi). Thus, CFG's "membership" communications also constitute
18 expenditures under the Act.

19 **(a) Express Advocacy Communications to the General Public**

20 CFG appears to have aired communications containing express advocacy to the general
21 public. Under the Act, the term "independent expenditure" means an expenditure by a person
22 expressly advocating the election or defeat of a clearly identified federal candidate, and not made
23 in concert or cooperation with or at the suggestion of a candidate, party, or agent. *See* 2 U.S.C. §

1 431(17), 11 C.F.R. § 100.16.¹³ Express advocacy exists where a communication uses phrases
 2 such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses
 3 words that are "in effect" an explicit directive to vote for a specified candidate. See 11 C.F.R. §
 4 100.22; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("MCFL").¹⁴

5 The definition of "expenditure" excludes non-partisan activity by corporations designed
 6 to encourage individuals to vote or register to vote, permitting corporations to make get-out-the-
 7 vote ("GOTV") communications to the general public. See 2 U.S.C. § 431(9)(B)(ii); 11 C.F.R. §
 8 114.4(c). Such communications, however, may not contain express advocacy or be directed at a
 9 specific combination of households selected by party affiliation or candidate preference. See 11
 10 C.F.R. § 114.4(d). The presence of express advocacy in a GOTV communication renders the
 11 costs of producing the communication an expenditure under the Act and, therefore, subject to the
 12 Act's source restrictions. See 2 U.S.C. § 431(9)(B)(ii); 11 C.F.R. § 114.4(c)(2), (d)(2).

13 In 2000, CFG funded the following phone bank message in connection with the general
 14 election in Arizona's 6th Congressional District:

15 Hello, this is former Congressman and Former Secretary of
 16 Housing Jack Kemp. Like Matt Salmon, Jeff Flake is dedicated to
 17 the Republican and Reagan ideas that you and I care about, like

¹³ The complaint does not allege that CFG's aired communications were made in concert or cooperation with or at the suggestion of a candidate, party, or agent.

¹⁴ Under 11 C.F.R. § 100.22(b), express advocacy also includes any communication in which the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning and that reasonable minds could not differ as to whether it encourages action to elect or defeat one or more clearly identifiable candidate(s) versus some other course of action. The First and Fourth Circuits have determined that subsection (b) of this regulation is invalid as an overly-broad restriction on free speech. See *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir.1996); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir.1997); *FEC v. Virginia Society for Human Life, Inc.*, 263 F.3d 379 (4th Cir. 2001); see also *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp.2d 248 (S.D.N.Y. 1998). The Eighth Circuit held that a state regulation with a definition of express advocacy identical to subsection (b) would likely not withstand a constitutional challenge. See *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999). The Supreme Court recently vacated a Fourth Circuit decision invalidating a North Carolina regulation similar to § 100.22(b) and remanded the case for further consideration in light of *McConnell*. See *North Carolina Right to Life v. Leake*, 344 F.3d 418 (4th Cir. 2003), vacated and remanded, 2004 WL 875548 (U.S. Apr. 26, 2004).

cutting tax rates, expanding economic growth and opportunity, limiting the size of government and restoring respect for Americans here and around the world. One of the reasons that I am so enthusiastic about Jeff Flake is that in the four years that he served as the President of Arizona's Goldwater Institute, Jeff promoted free market policies that helped grow the Arizona economy. When George W. Bush is elected President, he'll need people like Jeff Flake. Jeff will serve your first district, I believe in Arizona, with honest, integrity and dedication. Please vote on Tuesday and keep Jeff Flake in mind when you do. Thank you.

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Endorsement of Jeff Flake By urging the listener to vote on Tuesday, the phone message exhorts the listener to take electoral action. Moreover, the electoral action advocated by CFG is linked to a clearly identified candidate – Jeff Flake. Under such circumstances, the language is the functional equivalent of “vote for” Jeff Flake. The message thus rises to the level of express advocacy.¹⁵ See *MCFL*, 479 U.S. at 249.

Based on the presence of express advocacy, CFG's costs to produce this phone message constitute an independent expenditure under the Act.¹⁶ See 2 U.S.C. § 431(17). CFG spent \$20,792.49 to produce two automated phone messages by Republican politicians who endorsed Jeff Flake.

Thus, it appears likely that costs incurred to produce and deliver the phone message containing Jack Kemp's endorsement exceeded \$1,000.

In addition to phone messages, CFG appears to have made independent expenditures by financing television and radio advertisements containing express advocacy. For example, CFG ran the following television advertisement on behalf of Ric Keller during the 2000 Republican runoff primary in Florida's 8th Congressional district:

¹⁵ Cf. MUR 5089 (Matta Tuchman for Congress) (Commission split 3-3 on whether a mailer that criticized a fundraiser held by Congresswoman Loretta Sanchez and encouraged readers to take a look at Matta Tuchman but did not contain an exhortation to vote constituted express advocacy).

¹⁶ It is unclear whether CFG directed this message at the general public at large or at a specific combination of households selected by party affiliation or candidate preference. If CFG targeted its GOTV communication only to

1 This is a mission for Orange County Republican runoff voters.
2 *You must find a conservative Republican for Congress who will*
3 *battle liberal Democrat Linda Chapin. Ric Keller is the true fiscal*
4 *conservative in the runoff.* Only Ric Keller offers a sharp contrast
5 with Chapin on taxes and spending. Keller is a champion fighter
6 for lower taxes and less wasteful spending. This tape will self-
7 destruct in 10 seconds. *Remember, only a tax cutter like Ric Keller*
8 *can compete with liberal Linda Chapin.*

9 CFG spent \$86,884 on the
10 television advertisement, plus an additional \$33,595 on a 60-second radio version of the same
11 advertisement. The radio version of the advertisement is as
12 follows:

13 This is a mission for Orange County Republican primary runoff
14 voters. *Your mission is to find a Republican for Congress who will*
15 *battle liberal Democrat Linda Chapin. It's a dangerous mission.*
16 Left-wing special interest groups are pouring money into Chapin's
17 campaign. *Should you choose to accept this mission, you must find*
18 *a Reagan Republican like Ric Keller. Ric Keller is the true fiscal*
19 *conservative in the Republican run-off election.* Only Ric Keller
20 offers a sharp contrast with liberal Linda Chapin on the issues. On
21 taxes, Chapin pushed for an increase in the sales tax. Keller is
22 committed to lower taxes. On spending, Chapin dumped our tax
23 dollars on wasteful projects like a bronze frog. Keller is a
24 champion fighter for smaller government and less wasteful
25 spending. This tape will self-destruct in 10 seconds. *Remember,*
26 *only a tax cutter like Ric Keller can help you accomplish your*
27 *mission. Good luck.*

28
29 The Keller advertisements speak to viewers or listeners as voters, urging primary voters
30 to elect Ric Keller by declaring "You must find a conservative Republican for Congress... Ric
31 Keller is the true fiscal conservative in the runoff" and "you must find a Reagan Republican like
32 Ric Keller." These statements exhort the viewer or listener to take electoral action for a clearly-

registered Republicans, its funding of the phone message could violate the Commission's regulations even absent express advocacy. See 11 C.F.R. § 114.4(d)(3).

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1 identified candidate, constituting an express directive to vote for Ric Keller in the runoff primary.
2 Furthermore, there is a direct connection between the language of the advertisements and the
3 exhortation to vote – the advertisements' language charging viewers and listeners with the
4 mission to "find a conservative Republican for Congress" or "find a Reagan Republican like Ric
5 Keller" and claiming that "only a tax cutter like Ric Keller" can accomplish this mission does not
6 require an inferential leap to understand that the advertisements instruct them to vote for Ric
7 Keller.¹⁷ As a result, the advertisements are the functional equivalent of express advocacy. *See*
8 11 C.F.R. § 100.22(a); *MCFL*, 479 U.S. at 249-50 (holding that a publication urging readers to
9 vote pro-life and identifying specific pro-life candidates provided "in effect" an explicit directive
10 to vote for the specified candidates and constituted express advocacy).

11 Similarly, during the 2002 cycle, CFG ran the following advertisement on behalf of Steve
12 King, the successful candidate in the four-way Republican primary in Iowa's 5th Congressional
13 district:

14 *Congress sure could use a real Iowa conservative.* When it comes
15 to principles, nobody fights harder than State Senator Steve King.
16 In the general assembly, Steve King led the fight to eliminate the
17 inheritance tax and cut income taxes. Steve King helped lower our
18 property taxes too. I wish more congressmen were like Steve King
19 – someone with the courage to do what's right. Ya [*sic*] know,
20 politicians talk a lot about fighting for taxpayers – Steve King is
21 the real deal.

22 Script for Steve King Commercial, at <http://www.clubforgrowth.org/advertising/king-script.php>
23 (last visited Nov. 17, 2003) (emphasis added). CFG reportedly spent a total of \$140,000 on
24 advertising in Steve King's district during the 2002 election cycle. *See* Beaumont Thomas, *Great*

¹⁷ Cf. Statement of Reasons of Commissioners Smith, Mason and Toner in MUR 5024 (Council for Responsible Government), at 4 ("The deduction that the reader must make to fill the gap between the campaign sticker on the front page, that places the brochure in the context of an election, and the only language that arguably

1 *Right Hope Heads to D.C.*, DES MOINES, REG., Nov. 7, 2002, at A6: Again, this advertisement
2 constitutes express advocacy. Although it does not use the words "vote for" Steve King, the
3 phrase "Congress sure could use a real Iowa conservative" is a pointed exhortation to elect Steve
4 King to Congress. This language has no other reasonable meaning than to advocate that voters
5 support King.

6 In 2000 and 2002, CFG spent approximately \$260,479 on the radio and television
7 advertisements described above. Based on the presence of express advocacy, this Office
8 concludes that CFG's costs to produce and broadcast these advertisements constitute
9 expenditures that exceed the \$1,000 statutory threshold for political committee status. *See* 2
10 U.S.C. § 431(4).¹⁸

11 **(b) Express Advocacy Communications Made to Club for Growth**
12 **Supporters Who Are Outside its Restricted Class**

13 CFG publicly represents itself as a membership organization and directs its fundraising
14 solicitations and express advocacy communications to its purported "members."¹⁹ Under the

approaches a call to action to vote against Mr. Kean, Jr. on the following page is fatal to the complainant's argument that the first brochure contains express advocacy.").

¹⁸ CFG does not appear to be exempt from the Act's prohibition on direct corporate spending for political activity under 11 C.F.R. § 114.10. *See MCFL*, 479 U.S. at 262 ("[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."). In *MCFL*, the Court held that the ban on corporate expenditures does not apply to non-profit corporations that are formed for the express purpose of promoting political ideas, have no shareholders or other persons with claim on its assets or earnings, and are not established by a business corporation or labor union and do not accept contributions from such entities. *Id.* at 263-64. CFG fails under two of the *MCFL* criteria. First, as discussed above, CFG was formed for the express purpose of electing fiscally conservative Republicans to office, not merely to promote pro-growth political ideas. Second, CFG appears to have accepted corporate contributions on at least four occasions, and has admitted that it has a policy of accepting corporate contributions. *See* Public Citizen 527 Group Donor Database, at <http://www.citizen.org/congress/forms/527search.cfm> (last modified Jan. 6, 2003) (listing \$55,000 in corporate contributions from Bestbuilt Construction Company, Estee Lauder, Robsom Communities and W.M. Grace Development)

¹⁹ For example, CFG addressed a bulletin to its "members" touting the urgency of the 2002 Republican primary in Iowa's 5th Congressional district and requesting that its "members" send contributions to Steve King – the bulletin states, "*We strongly recommend that you support Steve King for Congress.*" *See* Club for Growth

1 Act, membership organizations may communicate with their members on any subject, including
2 communications that constitute express electoral advocacy and solicitations for contributions to
3 candidates, without those communications being classified as expenditures. *See* 2 U.S.C. §
4 431(9)(B)(iii); 11 C.F.R. § 100.134(a). Membership organizations may also use general treasury
5 funds, including money received from dues, to fund partisan communications to their members.
6 *See* 11 C.F.R. § 114.3(a)(2).²⁰

7 In order to qualify as a membership organization under the Act, the regulations require
8 that an organization to meet the following six requirements:

- 9 (1) The organization must be composed of members, some or all of whom are vested
10 with the power and authority to operate or administer the organization;
- 11 (2) The organization must expressly state the qualifications and requirements for
12 membership in its articles, bylaws, constitution, or other formal organizational
13 documents;
- 14 (3) The organization must make its articles, bylaws, constitution, or other formal
15 organizational documents available to its members upon request;
- 16 (4) The organization must expressly solicit persons to become active members;
- 17 (5) The organization must expressly acknowledge acceptance of membership, such as
18 by sending a membership card or including the member's name on a membership
19 newsletter list; and
- 20 (6) The organization is not organized primarily for the purpose of influencing the
21 nomination for election, or election, of any individual to federal office.

Bulletin, *available at* <http://www.clubforgrowth.org/candidates/020508-bulletin.html> (May 8, 2002) (*italics in original*) (archived web page);

²⁰ A membership organization may use a website to communicate a message of express advocacy, including endorsing or soliciting contributions to a candidate, as long as it uses a method, such as a password, to limit access to the message to its restricted class. *See* AO 1997-16 (ONRC Action Federal PAC). CFG's website, which requires a username and password to access its membership communications, appears to correspond with this requirement, although some web pages designated "members only" are available as search results and at least one website appears to contain a direct link to CFG's membership site. *See* Political USA: Online Directory of Politics and Government, *at* <http://www.politicalusa.com/link/organizations/conservative> (last visited Nov. 21, 2003).

1 11 C.F.R. §§ 100.134(e), 114.1(e)(1). The final membership organization criterion excludes
2 "organizations primarily organized to influence a federal election," which "cannot, by definition,
3 be classified as membership organizations." See Definition of "Member" of a Membership
4 Organization, 64 Fed. Reg. 41266, 41268-69 (Jul. 30, 1999).

5 CFG has the facial characteristics of a membership organization – its purported
6 "members" pay dues and participate in the organization's governance by attending candidate
7 forums, which help CFG select candidates to endorse based on their positions on tax and fiscal
8 issues. CFG's "members" receive regular newsletters containing public policy and political
9 updates, as well as periodic candidate endorsements that help "members" better focus their
10 campaign contributions. See How We Will Make a Difference, at [http://www.clubforgrowth.](http://www.clubforgrowth.org/how.php)
11 [org/how.php](http://www.clubforgrowth.org/how.php) (last visited Nov. 26, 2003). CFG fails, however, to qualify as a valid membership
12 organization under at least the final criterion because, as more fully discussed *supra*, it is
13 primarily organized to influence federal elections.²¹

²¹ See *supra* discussion of CFG's major purpose, at pp. 21-25; see also Dick Polman, *Now It's Republicans Quarreling as Right Wing Targets Moderates*, PHILA. INQUIRER, Jul. 6, 2003, at C1 ("Moore is eager to whack a few other incumbent Republicans next year – two moderate New York congressmen and another in Maryland. But Specter comes first, 'because if we can take out a four-term incumbent, the other moderates in Congress will start behaving themselves, for fear of suffering the same death experience.'"); Max Schulz, *A Shot in the Arm of the Body Politic: An Interview with the Club for Growth's Steve Moore*, MONTHLY PLANET, available at <http://www.cei.org/gencon/005,02120.cfm> (Aug. 2, 2001) ("The objective [of the Club for Growth] is to elect more free-market tax cutting candidates to Congress... We're interested not just in helping elect more pro-growth Republicans but also helping de-elect some of the anti-growth Republicans."); *When the Club for Growth is Discussed in Washington Circles, It's Usually the "Club" Part that Gets Attention*, BLOOMBERG NEWS SERVICE, Feb. 23, 2001.

("Now the group acts as political venture capitalists out of its tiny offices on Washington's K Street... Moore says that the young organization hopes to grow into a brand name, a 'seal of approval' for conservatives. 'I really view the Club as a carrot and a stick, or a carrot and a club maybe,' he said. 'The carrot is that we are going to offer donations to really good candidates. The stick or club is that we are going to go after defectors.'"). As further discussed *supra*, CFG's activities are overwhelmingly focused on electing fiscally conservative candidates to federal office. CFG appears to have limited involvement in state and local races and aims the vast majority of its advertising at federal races. See Club for Growth Ad Archive, at http://www.clubforgrowth.org/ad_archive.php (last visited Nov. 13, 2003). To participate in state and local politics, CFG has formed state chapters in Arizona, Colorado and Virginia that raise money for state and local candidates and ballot initiatives, and plans to organize other chapters in Michigan and Minnesota. See Eliza Newlin Carney, *Right on the Money?*, NAT'L J., Oct. 26, 2002; Chip Scutari, *Nationwide Group Targets State GOP's Big Spenders*, ARIZ. REPUBLIC, Sept. 12, 2003, at A1; Mary Shaffrey, *Tax Foes Vow to Defeat Measure*, WASH. TIMES, Apr. 16, 2002, at B1.

1 Further, CFG's status as a Section 527 political organization indicates that it is an
2 organization whose primary purpose is to influence the nomination, election or other selection of
3 individuals to public office. Indeed, to qualify for its section 527 tax exemption, CFG averred to
4 the IRS that it "is primarily dedicated to helping elect pro-growth, pro-freedom candidates
5 through political contributions and issue advocacy campaigns." See Club for Growth, Inc.
6 Federal Form 8871, Political Organization Notice of 527 Status, *available at* [http://www.irs.](http://www.irs.gov/charities/political/index.html)
7 [gov/charities/political/index.html](http://www.irs.gov/charities/political/index.html) (Aug. 4, 2000).²² CFG's mission statement confirms that its

²² Section 527 of the Internal Revenue Code provides a tax exemption to political organizations for income related to their principal purpose of influencing elections. The Internal Revenue Code defines a political organization as one that is:

{O}rganized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for... the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of presidential or vice-presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

National Fed. of Republican Assemblies v. United States, 218 F. Supp.2d 1300, 1331 (S.D. Ala. 2002) (citing I.R.C. § 527(e)(1), (2)) ("*Republican Assemblies*"). The Supreme Court recognized in *McConnell* that 527 political organizations, by definition, are organized for the express purpose of engaging in partisan political activity. See *McConnell*, 124 S.Ct. at 678-79, n.67. Section 527 organizations whose primary purpose is the nomination or election of state or local candidates presumably could qualify as valid membership organizations, but those with the primary purpose of nominating or electing federal candidates likely fail under the final membership organization criterion, which excludes organizations primarily organized to influence a federal election. See Definition of "Member" of a Membership Organization, 64 Fed. Reg. 41266, 41268-69 (Jul. 30, 1999).

The discussion of "primary purpose" in the context of whether CFG qualifies as a membership organization closely parallels the "major purpose" analysis. Indeed, at least one court has held that a 527 organization that possesses the "primary purpose" of nominating or electing individuals to public office also has, by definition, the "major purpose" of campaign activity. In *Republican Assemblies*, the district court deemed unconstitutional the expenditure reporting requirements set forth in 26 U.S.C. § 527(j) based on the statute's failure to require that reporting organizations disclose expenditures on behalf of particular candidates and the resulting lack of a substantial connection between the disclosure requirements and the government's interest in deterring actual or perceived corruption. See 218 F. Supp.2d at 1331-34. The court analyzed the disclosure requirements under *Buckley*, stating:

Pared to its essential language, a political organization is an organization whose primary purpose is to influence the nomination, election or other selection of individuals to public office. This definition compares favorably with *Buckley's* definition of a political committee as an organization whose major purpose is the nomination or election of a candidate for federal office. The "primary" purpose of an organization is plainly no different than its "major" purpose. Nor is a purpose of nominating or electing candidates substantively different from a purpose of influencing their nomination or election... Because a political organization cannot be meaningfully distinguished from a political committee,

1 goal is to elect political candidates who are advocates of limited government and lower taxes.

2 See Club for Growth Mission Statement, at <http://www.clubforgrowth.org/mission.html> (last
3 visited Oct. 21, 2003).

4 Because CFG is primarily organized to influence federal elections, CFG is not a valid
5 membership organization, nor are its purported "members" within the corporation's restricted
6 class. Notably, in its Statement of Organization filed with the Commission, CFG PAC identifies
7 CFG, its connected organization, as a corporation. See Club for Growth, Inc. PAC Statement of
8 Organization, Jul. 27, 1999, at 1. Under the Act, a corporation may solicit contributions to its
9 SSF from its restricted class, which consists of its executive and administrative personnel and
10 stockholders, and the families thereof. See 2 U.S.C. § 441b(b)(2); 11 C.F.R. § 114.5(g)(1).
11 When a corporation communicates with its restricted class, it may issue communications that
12 contain express advocacy and solicitations for candidates and parties and may coordinate its
13 communications with the candidates. 11 C.F.R. § 114.3(a)(1). As a corporation, CFG is
14 required to confine its express advocacy communications to its executive and administrative
15 personnel and their families. See 2 U.S.C. § 441b(b)(2), (b)(4)(A)(i); 11 C.F.R. § 114.5(g)(1).
16 Because CFG has repeatedly aimed its communications containing express advocacy and
17 solicitations to individuals outside this restricted class, CFG appears to have made expenditures
18 that trigger political committee status.²³ See 11 C.F.R. § 114.2(a).

Section 527(j) may constitutionally require disclosures of political organizations
even if they engage in no express advocacy.

Id. at 1331-32 (internal citations omitted), *vacated on other grounds sub nom. Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003) (holding disclosure requirements constitutional in their entirety).

²³ The generalized descriptions of CFG's disbursements set forth in CFG's monthly disclosure reports filed with the Internal Revenue Service do not provide a clear accounting of the costs associated with CFG's communications to its supporters; however, given that CFG has approximately 16,000 members, this Office believes the costs have likely exceeded \$1,000 in any given year.

1 (c) Conclusion

2 CFG appears to have made expenditures meeting the \$1,000 threshold for political
3 committee status set forth in 2 U.S.C. § 431(4)(A) in two ways: by making express advocacy
4 communications to the general public and by soliciting contributions from and making
5 communications constituting express advocacy to supporters beyond its restricted class.
6 Accordingly, there is reason to believe that CFG violated 2 U.S.C. §§ 433 and 434 by failing to
7 register and report as a political committee, and that CFG and CFG PAC violated 2 U.S.C. §§
8 441a(f) and 441b(a) by failing to comply with the Act's contribution limits and source
9 restrictions.

10 CFG, CFG PAC and CFG Advocacy were established by the same corporation and all
11 appear to be controlled by the same person or group of persons. All committees established,
12 financed, maintained, or controlled by the same corporation, labor organization, person or group
13 of persons are affiliated. See 11 C.F.R. §§ 100.5(g)(2)-(3), 110.3(a)(1)(ii)-(2). All contributions
14 made or received by more than one affiliated committee shall be considered to be made or
15 received by a single political committee. See 11 C.F.R. § 110.3(a). The CFG entities thus appear
16 to be affiliated and share a single contribution limit under the Act. As a practical matter,
17 affiliation between CFG and CFG PAC likely increases the number and amount of excessive
18 contributions but does not change the substance of the analysis.

19 IV. ALTERNATIVE VIOLATIONS

20 A. Allocation

21 CFG's failure to qualify as a valid membership organization renders its current structure
22 impermissible under the Commission's regulations. If an investigation reveals that CFG and
23 CFG PAC had been operating as a single political committee conducting federal and non-federal

1 activity rather than as two federal political committees, it would appear that CFG and CFG PAC
2 have violated the Act by failing to allocate federal and shared expenses pursuant to the
3 Commission's allocation regulations and by failing to allocate expenditures between multiple
4 federal candidates. *See* Advisory Opinion 2003-37 (Americans for a Better Country); *see also*
5 MUR 5019 (Keystone Corporation).

6 A political committee that conducts both federal and non-federal activities may either set
7 up a single federal account subject to the requirements of the Act, or establish separate federal
8 and non-federal accounts. *See* 11 C.F.R. § 102.5(a). When a political committee uses two
9 accounts, it must allocate shared expenses between the accounts. *See* 11 C.F.R. § 106.6(a), (b).
10 A committee may pay shared expenses either by: (1) paying the entire amount of the expenses
11 from its federal account and transferring funds from its non-federal account to cover the non-
12 federal share of the expenses; or (2) establishing a separate allocation account into which funds
13 from its federal and non-federal accounts shall be deposited solely for the purpose of paying
14 shared expenses. *See* 11 C.F.R. § 106.6(e). A political committee that pays allocable expenses
15 in accordance with 11 C.F.R. § 106.6(e) is required to report each disbursement from its federal
16 account or its separate allocation account as a payment for a joint federal and non-federal
17 expense. *See* 11 C.F.R. § 104.10(b)(4). All disbursements, contributions, expenditures and
18 transfers by the committee in connection with any federal election shall be made from its federal
19 account. No transfers may be made to the federal account from any non-federal account, except
20 as provided in 11 C.F.R. § 106.6(e). *See* 11 C.F.R. § 102.5(a)(1).

21 Under its current structure, CFG has held itself out as a connected organization, and CFG
22 PAC has held itself out as an SSF. While a connected organization may pay all of the
23 establishment, administration and solicitation costs of its SSF from treasury funds, a political

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1 committee with federal and non-federal accounts must allocate fundraising and administrative
2 costs. Compare 2 U.S.C. § 441b(b)(2) with 11 C.F.R. § 106.6. CFG PAC has reported few, if
3 any, administrative or overhead expenses, while IRS reports filed by CFG include disbursements
4 for administrative expenses including office supplies, document duplication, telephone fees, rent
5 and clerical support.²⁴ If CFG and CFG PAC are to be regarded as the federal and non-federal
6 accounts of a single political committee, rather than as a connected organization with an SSF,
7 this failure to allocate administrative expenses violates 11 C.F.R. § 106.6. Moreover, and as
8 described *supra* pp. 25-35, CFG funded communications containing express advocacy of federal
9 candidates and solicitations on behalf of federal candidates. All such expenditures were required
10 to be paid in full by the federal account, CFG PAC, rather than by CFG. See 11 C.F.R. § 102.5.
11 CFG thus appears to have violated 2 U.S.C. §§ 441a(f), 441b(a) and 11 C.F.R. §§ 102.5, 106.6
12 by failing to appropriately allocate administrative expenses between federal and non-federal
13 accounts and by financing entirely federal expenses from a non-federal account, which may have
14 resulted in the use of prohibited and excessive contributions in federal elections. CFG similarly
15 has failed to report disbursements from a federal account or a separate allocation account in
16 payment for joint federal and non-federal expenses in accordance with 11 C.F.R. § 104.10(b)(4).

17 In addition, expenditures, including independent expenditures, made on behalf of one or
18 more clearly identified federal candidates must be attributed to each candidate according to the
19 benefit reasonably expected to be derived. See 11 C.F.R. § 106.1(a)(1). In the case of a
20 fundraising program or event where funds are collected by one committee for more than one
21 clearly identified federal candidates, the attribution is determined by the proportion of funds

²⁴ See, e.g., Club for Growth, Inc. Federal Form 8872, Report of Contributions and Expenditures: Schedule B, available at <http://www.irs.gov/charities/political/index.html> (Apr. 20, 2004), at 14-21; (Feb. 20, 2004), at 14-19; (Aug. 12, 2003), at 9-17; (Jun. 6, 2002), at 9-13.

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1 received by each candidate as compared to the total receipts of all candidates. *Id.* Separate
2 segregated funds and nonconnected committees making expenditures on behalf of more than one
3 clearly identified federal candidate must report such expenditures pursuant to 11 C.F.R. §
4 104.10(a). *See* 11 C.F.R. § 106.1(a)(2).

5 CFG appears not to have attributed expenditures it made for communications soliciting
6 contributions to multiple federal candidates. *See* discussion *supra* pp. 30-35. Rather than
7 attribute these expenditures to each candidate based on the proportion of funds received by each
8 candidate as compared to the total receipts of all candidates, CFG appears to have used non-
9 federal funds to pay the for the communications in their entirety. CFG, therefore, may have
10 violated 2 U.S.C. §§ 441a(f), 441b(a) and 11 C.F.R. §§ 104.10(a) and 106.1 by failing to attribute
11 and report such expenditures and by using prohibited funds to pay for the communications.²⁵

12 Accordingly, there is reason to believe that CFG and CFG PAC violated 2 U.S.C. §§
13 441a(f), 441b(a) and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6 by failing to attribute and
14 report expenses between multiple federal candidates, by failing to allocate and report shared
15 administrative and fundraising activities and by using prohibited funds to pay for the federal
16 share of those expenses, which may have resulted in prohibited and excessive contributions.

17 **B. Prohibited Corporate Contributions**

18 If an investigation reveals that CFG's structure is more analogous to a corporation with a
19 connected SSF, rather than as one or more political committees, it would appear that CFG made
20 expenditures in violation of the Act.²⁶ *See* discussion *supra* pp. 25-35. The Act prohibits

²⁵ CFG and CFG PAC also may organize as a single SSF conducting federal and non-federal activity, with CFG Advocacy as its connected organization. This organization would be required to allocate shared expenses in accordance with 11 C.F.R. § 106.6(b).

²⁶ As discussed *supra* note 18, CFG does not appear to be eligible for *MCFL* status because it has accepted corporate contributions totaling at least \$10,000 in 2000 and \$45,000 in 2002, amounts that do not appear to be *de*

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1 corporations from making contributions or expenditures from their general treasury funds in
2 connection with a federal election. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a). Section
3 441b(a) also makes it unlawful for any candidate, political committee, or other person knowingly
4 to accept or receive corporate contributions. Contributions and expenditures are broadly defined
5 to include anything of value that is given or received for the purpose of influencing a federal
6 election. *See* 2 U.S.C. § 431(8)(A), (9)(A).

7 Under the Act, a corporation may establish an SSF and solicit contributions to its SSF
8 from the corporation's restricted class, which consists of its executive and administrative
9 personnel and stockholders, and the families thereof. *See* 2 U.S.C. § 441b(b)(2); 11 C.F.R. §
10 114.5(g)(1). When a corporation communicates with its restricted class, it may issue
11 communications that contain express advocacy and solicitations for candidates and parties and
12 may coordinate its communications with the candidates. *See* 11 C.F.R. § 114.3(a)(1). As a
13 corporation, CFG is required to confine its express advocacy communications to its executive
14 and administrative personnel and their families. *See* 2 U.S.C. § 441b(b)(2), (b)(4)(A)(i); 11
15 C.F.R. § 114.5(g)(1).

16 CFG appears to have made expenditures by including express advocacy in its GOTV
17 communications and broadcast advertisements and by soliciting contributions and making
18 express advocacy communications to individuals beyond its restricted class, *see supra* pp. 25-35,
19 both of which would constitute corporate expenditures prohibited by the Act. Accordingly, there
20 is reason to believe that CFG violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a).

minimus. See FEC v. National Rifle Ass'n, 254 F.3d 173, 192 (D.C. Cir. 2001) (holding that the NRA qualified for MCFL status in 1980 because the organization received only \$1,000 in corporate contributions but was not eligible in 1978 and 1982, when it received \$7,000 and \$39,786, respectively).